

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Revision of Part 22 and Part 90 of)	WT Docket No. 96-18
the Commission's Rules to)	
Facilitate Future Development of)	
Paging Systems)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	

REQUEST FOR STAY

Radiofone, Inc. (Radiofone), by its attorneys and pursuant to Section 1.43 of the Commission's Rules, 47 C.F.R. § 1.43, respectfully requests the Commission to stay the effectiveness of its elimination of Section 90.496 of the Commission's Rules as provided in Appendix A to the Second Report and Order and Further Notice of Proposed Rulemaking (Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems), 12 FCC Rcd 2732 (1997) [hereinafter Second R&O]. Section 90.496 provided the procedures for obtaining and operating under an extended implementation schedule for the construction of a 929 MHz paging system. Radiofone has been granted extended implementation schedules for two regional exclusive 929 MHz paging systems, and is actively engaged in constructing its regional systems in accordance with those schedules. The elimination of Section 90.496 raises an issue as to whether the Commission eliminated the extended implementation schedules which have already been granted to Radiofone.

Concurrent with this Request for Stay, Radiofone is filing a Petition for Review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The Petition for Review requests the court to hold unlawful the Commission's elimination of Section 90.496. In this Request, Radiofone asks the Commission to stay its elimination of Section 90.496 pending the court's decision on review. The stay therefore would permit Radiofone to continue constructing its 929 MHz paging systems for which extended implementation schedules have been granted. The stay also would preclude the Commission from auctioning those paging frequencies for which licenses have been granted to Radiofone.

STANDARD FOR GRANT OF STAY

Radiofone satisfies the standards for grant of a stay as set forth in Virginia Petroleum Jobbers Ass'n v. Federal Power Comm., 259 F.2d 921, 925 (D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir 1977). In granting a stay, the Commission considers: (a) the likelihood of the requesting party's success on the merits; (b) the likelihood that irreparable harm to the requesting party will result in the absence of a stay; (c) the absence of harm to other interested parties in the event that the stay is granted; and (d) the extent to which the stay serves the public interest. Virginia Petroleum Jobbers, 259 F.2d at 925.

All four factors require the Commission to stay its elimination of Section 90.496.

A. Radiofone Is Likely to Succeed on the Merits of Its Petition for Review in the D.C. Circuit

The Commission eliminated Section 90.496 without providing any justification for doing so. Nowhere in the corresponding Notice of Proposed Rulemaking, 11 FCC Rcd. 3108 (1996) [hereinafter NPRM], nor in the Second R&O did the Commission suggest that the rulemaking would affect previously granted extended implementation schedules. The Commission stated that the rulemaking would consider the status of pending applications, but never addressed the status of granted extended implementation schedules. NPRM para. 144; Second R&O para. 6. However, rather than announcing that pending requests were to be dismissed, the Second R&O is void of discussion about extended implementation schedule issues. Instead, in the revised rules in Appendix A to the Second R&O, the Commission simply eliminated Section 90.496.

It is not clear how the Commission intends its elimination of the rule to impact existing grantees. On the one hand, the Second R&O indicates that "the public interest would be served by allowing incumbent (non-geographic) paging licensees to continue to operate under their existing authorizations." Second R&O para. 57 (emphasis added). This language suggests that extended implementation grantees may continue construction in accordance with their authorized schedules. On the other hand, since Section 90.496(c), (d) and (e) govern operation by a licensee

once an extended implementation schedule has been granted, one could infer that the rule deletion may impact existing grantees in some fashion. In this regard, the Commission did not address Radiofone's comments in the captioned docket concerning extended implementation schedules that had already been granted.

Radiofone stated:

[T]he Commission should clarify that it does not intend to rescind existing extended implementation grants. Recision would be completely at odds with any notion of the public interest and administrative fairness. These carriers have substantially revised their business plans in reliance on the extended implementation grants. Moreover, nothing in the record has undermined the Commission's finding, based on strong industry support, that the extended implementation schedule would serve the public interest, by allowing smaller carriers to participate in the provision of regional paging services. See Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8325-26, 8334, paras. 22-24, 43, 47 (1993).

Radiofone March 18, 1996 Comments at 3.

The Commission's failure to clarify or provide any justification for its elimination of Section 90.496, and its failure to address Radiofone's comments in this regard, is arbitrary and capricious, and contrary to constitutional right. See, e.g., National Labor Relations Bd. v. Metropolitan Life Ins. Co., 380 U.S. 438, 443 (1965) (agency must "'disclose the basis of its order'"); Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 48 (1983) (agency must explain the basis for its decisions); HBO v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1976) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public"). Pursuant to Section 706 of the Administrative Procedure Act, the

D.C. Circuit must hold the Second R&O to be unlawful. 5 U.S.C. § 706. Thus, Radiofone is likely to succeed on the merits of its case.

B. Absent a Stay, Radiofone Will Suffer Irreparable Harm

Absent a stay of the elimination of Section 90.496, or a clarification that existing schedules are not affected, Radiofone will suffer irreparable harm by being precluded from constructing its paging system as planned. As Radiofone stated:

. . . Radiofone's regional systems may be of little value if Radiofone is unable to complete the buildout of the systems as originally planned. The Commission has in essence invited Radiofone to invest what will ultimately amount to tens of millions of dollars, only to change the rules in mid-stream in a way that could strand much of this investment.

Radiofone Comments at 4.

Absent a stay, Radiofone fears that the Commission will auction the license rights which Radiofone previously was granted. If the D.C. Circuit later were to reverse the Commission's elimination of Section 90.496, Radiofone is concerned that it may not be able to recover those rights. Radiofone's business plan has been designed around being able to complete construction of its paging systems on 929.6375 MHz and 929.6875 MHz. If Radiofone is unable to complete construction of the subject systems in accordance with its granted schedules, Radiofone will be unable to provide adequate coverage in many areas where it has already promised its customers that they will have seamless regional service. These customers include doctors,

hospitals, ambulance services, emergency road services, and others concerned with the safety of the public.

C. Other Interested Parties Will Not Be Harmed If the Stay Were Granted

No other parties will be harmed should the Commission grant Radiofone's request. Parties who have previously been granted extended implementation schedules pursuant to Section 90.496 will want to retain those schedules. Parties who do not have licenses on those frequencies have been on notice that Radiofone and other licensees were constructing paging systems on those frequencies. The stay would merely retain the status quo. In any event, it will be impossible for potential bidders in the upcoming paging auctions to perform due diligence prior to bidding unless the uncertainty surrounding extended implementation schedules is resolved.

Additionally, the stay does not need to last long. The FCC could simply issue an order reinstating Section 90.496 as it applies to granted extended implementation schedules. Such an order could be issued as an Erratum to the Second R&Q. Section 90.496 could be changed by inserting the following text at the beginning:

This Section 90.496 applies only to extended implementation schedules authorized prior to May 12, 1997.

In the alternative, the Commission could simply issue a written clarification that existing extended implementation schedules will be honored despite the elimination of the rule.

In sum, even if the stay would harm other parties, the Commission could minimize that effect by promptly revising Section 90.496.

D. The Public Interest Favors the Grant of a Stay

The public interest is best served by the requested stay. Granting the stay would permit those parties with extended implementation schedules to continue to construct their paging systems. As noted above, the Commission previously held that extended implementation schedules would serve the public interest, by allowing smaller carriers to participate in the provision of regional paging services. Without a stay, if the Commission were to auction the subject licenses, the public interest would be harmed because the auction participants would expend their time and scarce resources on a flawed auction, rather than awaiting resolution of the important issues raised in Radiofone's Petition for Review.

CONCLUSION

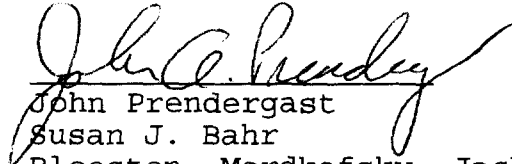
For the foregoing reasons, Radiofone has demonstrated that its request for stay satisfies the four factors considered by the Commission in determining whether to grant a stay. In accordance with other Commission decisions granting stays, e.g., Amendment of Section 73.202(b), Table of Allotments, 2 FCC Rcd. 6132 (1987) (granting stay to avoid situation where applicants could file for an allotment which is ultimately deleted), Radiofone respectfully

requests that the Commission stay its elimination of Section 90.496 pending the D.C. Circuit's decision on review of the Second R&O.

Respectfully submitted,

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